(17,963.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 478

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 26, 1900.

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a Plea before the supreme court of Iowa in a cause therein tried and determined, wherein Daniel H. Talbot was plaintiff and appellant and Sioux National Bank of Sioux City, Iowa, defendant and appellee.

Be it remembered that on the 3rd day of April, 1899, there was filed in the supreme court of Iowa a printed abstract of record, duly served as required by law, the same being in the words and figures following, to wit:

1 In the Supreme Court of the State of Iowa, January Term, 1899.

DANIEL H. TALBOT, Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Appellee. } At Law.

Appeal from Woodbury district court—Hon. Geo. W. Wakefield, trial judge.

D. H. Talbot, for appellant.
J. S. Lothrop, attorney for appellee.

APPELLANT'S ABSTRACT OF RECORD.

Bill of Exceptions.

Be it remembered that at the May term, 1898, of said court, and on the 13th day of May, 1898, this came on for ruling upon the motion of the defendant to strike from the third count of the amended petition which was filed, as shown by the appearance docket, July 17, 1897, in words and figures as follows:

(*Motion to Strike from Amended Petition and to Make More Specific. Filed July* 17, 1897.)

Now comes the above-named defendant and moves the
2 court to strike from count three of plaintiff's amended petition filed herein May 20th, 1897, as follows:

1st. To strike from said count all after the word "herein" in line eight of said count, down to and including the word "and" in line thirteen thereof; also to strike out the word "further" in said line thirteen, because said matter is irrelevant and redundant; asks for judgment when the petition shows no cause of action; asks for impossible judgment and fails to comply with the former order of this court to make his petition more specific.

2nd. To strike from said count all commencing with the word "plaintiff" in line fifteen down to and including the word "bank" in line nineteen thereof, because therein asking for an order to examine books, etc., and no statement showing the necessity for such order; said matter being irrelevant and redundant; also that said

matter shows the books, etc., asked for to be in the control of a person not a party to this action and over whom this court has no jurisdiction.

Motion to Make More Specific.

Defendant also moves the court to require plaintiff to make his count three of said amended petition, to wit: so much thereof as is not included in the motion to strike, more specific in this, to wit:

1st. Let him state the date when the said sum of $173.11 or the last item thereof, claimed in said count three, was deposited in said defendant bank.

2d. Let him state when, if ever, he drew a check for the sum balance of any moneys deposited by him in said bank of which payment by the bank was refused. Let him give dates and the sum named in such check or checks, and the date when the same was presented and discharged.

LOTHROP & PYNE,
Attorneys for Defendant Bank.

3 And also for a ruling upon a motion for rehearing of this cause, on the demurrer, filed by the plaintiff, as shown by the appearance docket, April 19, 1898, in words and figures following:

Motion for a Rehearing.

"Comes now the plaintiff in the above-entitled action and moves the court to order a rehearing of said cause on the demurrer filed by the defendant herein, and for grounds thereof states:

"1st. That since the argument was had on said demurrer and since the decision of the court on said demurrer, the Supreme Court of the United States in the case of Brown *vs.* Marion National Bank of Lebanon, Ky., has decided substantially the same questions raised by the said demurrer in this cause and that said decision is favorable to the plaintiff herein.

"2nd. Because the importance of a correct decision by this court upon the demurrer filed by the defendant herein requires and demands a further and more thorough examination of the authorities and law applicable to the issues raised by said demurrer in order that justice may be meted out to the parties to this action and extra costs and expenses avoided.

"ARGO & MIDDLEKAUF,
"*Att'ys for Plaintiff.*"

And the issues in this case being therein joined, the court ordered the following record to be made, and which record is to be found on page 395 of the District Court Record No. 35 of Woodbury county, Iowa, in words and figures as follows:

And now, to wit: May 13, 1898, this cause comes on for ruling upon the motion of the defendant to strike from the third count of the amended petition herein and to make the same more specific the same having been heretofore submitted and taken under ad-

visement by the court, the Hon. F. R. Gaynor, presiding
4 judge; and the court having duly considered the said motion and being fully advised in the premises sustains the same as to first ground of said motion to strike, and overrules the same as to second ground thereof; and as to the grounds of said motion asking that said amended petition be made more specific, the court sustains the same. This said ruling is made upon the motion as herein stated, filed July 17, 1897; and to said ruling both parties hereto except—and upon the motion for rehearing of this cause filed by plaintiff April 19, 1898, and duly submitted to the court, Hon. F. R. Gaynor, presiding judge, the court being advised, finds against the plaintiff and overrules the same; to which ruling the plaintiff excepts.

And with the consent and at the request of the plaintiff, the court, as a part of the same order and recorded in the same entry on page 395 of the District Court Record No. 35, added thereto and made a part thereof, the following sentence, constructed by words as follows:

"And therefore, the plaintiff by his attorneys, Argo & Middlekauf, elects to stand on the record in this cause as now made and not to plead over, whereupon the said plaintiff is given ninety days to file bill of exceptions."

And in view of the foregoing position taken by parties in interest and the court, the clerk will here copy in full the original notice issued from the office of the sheriff of Woodbury county, Iowa, on the 29th day of August, 1896, and the certificate of personal service made by the same officer on James F. Toy, president of the Sioux national bank, which, as shown by the appearance docket of Woodbury county, Iowa, was made and filed on August 29, 1896:

Original Notice.

"In the District Court of the State of Iowa in and for Woodbury County, October Term, A. D. 1896.

"D. H. TALBOT, Plaintiff,
vs.
THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, and JAS. F. Toy, President, Defendant.

5 "To the Sioux National Bank of Sioux City, Iowa, and Jas. F. Toy, president:

"You are hereby notified that on or about the 7th day of October, A. D. 1896, the petition of plaintiff in the above-entitled cause will be filed in the office of the clerk of the district court of the State of Iowa, in and for Woodbury county, claiming of you the sum of sixteen thousand dollars, money as justly due from you, and interest thereon at eight per cent. from the 7th day of October, A. D. 1896, as money justly due and owing to plaintiff for unlawful, excessive and usurious interest charged against plaintiff and taken from him by said Sioux national bank during the years 1889, 1890, 1891, 1892,

1893, 1894, 1895 and 1896. Plaintiff will also ask an accounting of all moneys paid to said bank by him and all moneys received by him from said bank, under sections 5197 and 5198 of the Revised Statutes of the United States relating to national banks.

"And that unless you appear thereto and defend before noon of the second day of the next term, being the October term of the said court, which will commence at Sioux City, Iowa, on the 19th day of October, 1896, default will be entered against you and judgment and decree rendered against you as provided by law.

"Dated 29th day of August, A. D. 1896.

"GEORGE W. ARGO,
"*Attorney for Plaintiff.*

"STATE OF IOWA, }
Woodbury County, } ss:

"Received the within notice the 29th day of August, 1896, and I hereby certify that I served the same on James F. Toy, August 29, 1896, at Sioux City, Woodbury county, Iowa, by reading the same to James F. Toy, or by offering to read the original to him, which he waived, and delivering to him a true copy thereof on the 29th day of August, 1896, in Sioux City township, Woodbury county, Iowa.

"W. C. DAVENPORT,
"*Sheriff of Woodbury Co.,*
"By JOHN A. DAVENPORT, *Deputy.*

6 "Fees: Service, 75c.; copies, 50c.; mileage, 20c.; total, $1.45. Paid by plaintiff August 29, 1896.

"W. C. DAVENPORT, *Sheriff.*

"STATE OF IOWA, }
Woodbury County, } ss:

"I hereby certify that the within notice came into my hands for service on the 29th day of August, 1896, and that I personally served the same on the defendant by reading the same to James F. Toy, president of the Sioux national bank, or by offering to read the same to him, which he waived, and delivering to him a true copy thereof on the 29th day of August, 1896, in Sioux City township, Woodbury county, Iowa.

"W. C. DAVENPORT, *Sheriff,*
"By JOHN A. DAVENPORT, *Deputy.*"

Clerk will here copy the original petition, which is shown by the appearance docket was filed October 7, 1896, in full, in words and figures as follows:

Petition.

"The plaintiff states that the defendant, The Sioux National Bank, is a corporation duly organized and existing under and by virtue of the banking laws of the United States, and as such is capacitated to sue and to be sued, and that the defendant, James F. Toy, is president of said defendant bank.

"The plaintiff claims of the defendants and each of them the sum of $16,000, as money justly due plaintiff from defendants, on account of unlawful and usurious interest, knowingly and unlawfully taken from the plaintiff within the seven years last past.

"The plaintiff further alleges that during said time he had various and numerous business transactions with the defendant bank; in all said transactions defendant charged and exacted a greater rate of interest for the use of moneys had and received
7 by plaintiff from the defendants than the law recognizes or permits a national bank to charge for the use of money.

"Plaintiff further states that the books and accounts wherein said transactions have been kept and entered of record are in the possession of the defendant, and that plaintiff has no itemized statements of the account between him and the defendants.

"That at the present time the books, checks and vouchers and accounts and other evidence of the dealings and business had between plaintiff and defendant are in the hands of one Jonathan Brown, who claims to be the receiver of said defendant bank, and that said Brown, as receiver, and having possession of said books and accounts, declines and refuses to allow plaintiff to examine said books and accounts between plaintiff and defendants, and refuses to furnish plaintiff with a copy of said account or an itemized statement showing the different items and full account between the parties of this action.

"And, therefore, the plaintiff is unable to attach to his petition an exhibit showing the full account between him and defendants, and is also for the same reason unable to incorporate in this petition such statement or bill of particulars.

"The plaintiff further states that there is now a balance due him from defendants of about $250, which sum was deposited with the defendant subject to check, but has never been drawn out or paid over to the plaintiff.

"Plaintiff further states that this action is commenced under and by virtue of sections 5197 and 5198 of the Revised Statutes of the United States relating to national banks.

"Plaintiff further states that there is now justly due and owing to him from the defendants the full sum of $16,000, no part of which has been paid.

"Wherefore plaintiff demands judgment against the de-
8 fendants and each of them for the full sum of $16,250, together with interest and costs of this action, and also prays this honorable court to make an order that plaintiff may have the opportunity to inspect and examine the books and accounts wherein are entered and kept the dealings and business transactions between plaintiff and defendant, and take a certified copy of said account in order that same may be used upon trial of said case and as an exhibit to plaintiff's petition.

"GEO. W. ARGO,
"*Attorney for Plaintiff.*"

Clerk will here copy in full defendant bank's demurrer to petition, filed as shown by the appearance docket October 23, 1896, by

its attorneys, Lothrop & Pyne (who appeared as attorneys of record October 20, 1896), in words and figures as follows:

Demurrer to Petition.

"The defendant, The Sioux National Bank, comes and demurs to plaintiff's petition and for cause shows that the matters and things therein stated, as there stated and set forth, are sufficient in law to entitle plaintiff to recover, and for further causes of demurrer said defendant shows to the court:

"1st. That there is a misjoin-er of parties defendant to said action.

"2nd. That there is a misjoin-er of causes of action set out in said petition.

"3rd. That there is no allegation of any contract or agreement between plaintiff and said defendant for the payment of the alleged usurious interest.

"4th. That no copy of certificate of deposit or other evidence of indebtedness of such bank to plaintiff on account of deposit therein is attached to the petition.

"5th. That it appears from said petition that the alleged
9 claim for usurious interest is barred by the statute of limitations.

"6th. That it appears from said petition that the defendant bank is now and was at the commencement of this action in the custody and control of the United States by its receiver appointed thereto under and by virtue of the laws of the United States, and this court has no jurisdiction to consent that an action be brought against said receiver, and no suit or action at law can be brought against said bank affecting the revenues or assets thereof while in process of liquidation by a receiver.

"7th. That this court has no jurisdiction to order the receiver to grant to plaintiff an inspection of the books of the bank.

"8th. That this action is improperly brought against the defendant bank, the petition showing that its assets, property and effects were at the time of commencing the same in the hands, possession and control of the United States by its receiver, duly appointed thereto under the laws of the United States.

"9th. That in effect the action is against the receiver, and this court is without jurisdiction to entertain or consider the same."

Clerk will here copy in full the order of court permitting the defendant to withdraw its demurrer and file motion in this cause, as shown by the entry in the District Court Record No. 33, page 117, in words and figures as follows:

"And now, at this time, this cause coming on for hearing and the parties appearing by their respective attorneys, it is the order of court that the defendant Sioux National Bank have leave to withdraw its demurrer and file motion in this cause."

Clerk will here copy in full the demurrer of James F. Toy,
10 by his attorney, M. J. Sweeley (who appeared as attorney of record October 20, 1896), and which said demurrer is shown

by the appearance docket as having been filed October 23, 1896, in words and figures as follows:

"Comes now James F. Toy, president, the defendant above named, and demurs to the plaintiff's petition on the ground that the facts stated in said petition do not entitle the plaintiff to the relief demanded in this:

"1st. That it is not shown in said petition that this defendant had any part in the transactions referred to by the plaintiff, or that he charged or exacted any illegal or usurious interest in any deals, contracts or transactions had with the plaintiff.

"2nd. That under the facts set up in plaintiff's petition this defendant is not in any manner liable to the plaintiff for or on account of any sum of money owed plaintiff by the defendant bank growing out of interest paid or money deposited."

Clerk will here copy in full motion to elect to divide and make more specific by defendant Sioux National Bank, and which as shown by the appearance docket was filed November 4th, 1896, in words and figures as follows:

"Now comes the above-named defendant, The Sioux National Bank, and moves the court to require the plaintiff to divide his petition into counts so that the alleged claims for the recovery for and on account of usurious interest shall be separated from the alleged claim for money deposited with said defendant bank, so as to enable said defendant to plead or answer to said different claims separately.

"Said defendant also moves the court to rule the plaintiff to make his petition more specific, in this, to wit:

"1st. Let him state the day or dates when the alleged usurious interest was taken by defendant as alleged in said petition.

11 "2nd. Let him state what sum of alleged usurious interest, if any, was paid to said defendant by plaintiff within two years prior to commencing this action and give the date or dates of such payments and the sum paid at such date or dates.

"3rd. Let him state the contract or agreement made by plaintiff for the payment of the alleged usurious interest, the date or dates of such contract or contracts, and the name of the party, officer of said defendant, with whom made.

"4th. Let him state the rate of the alleged usurious interest paid by him to defendant within two years prior to commencing this action.

"5th. Let him state the date or dates when he deposited money with defendant as alleged in petition that has not been drawn out or paid over to plaintiff.

"6th. Let him state whether he has ever presented a check for the alleged balance of money due him for deposits in defendant bank subject to check, and give the date of presenting such check.

"7th. Let him attach as an exhibit to his petition a copy of his account against said defendant for his alleged balance of deposit therein.

"And the said defendant further moves the court to rule the plaintiff to elect on which cause of action, to wit: to recover for the

alleged taking of usurious interest or to recover for the alleged balance of deposits, he will then proceed, and to dismiss as to the other, also to elect as to which defendant, the bank or James F. Toy, he will proceed against and dismiss as to the others, for the reason that said actions and parties are improperly joined herein, there being no law for the recovery against an individual of the statutory penalty for taking usurious interest claimed in this action."

And upon December 31, 1896, the court, in ruling upon the demurrer of James F. Toy, and on the motion of the de-
12 fendant Sioux National Bank to elect to divide and make more specific, ruled in words and figures as follows (which is to be found recorded in the District Court Record No. 33, p. 191):

"And now, to wit: December 31, 1896, this cause coming on for ruling upon the demurrer of the defendant James F. Toy, and the motion of the defendant Sioux National Bank, the court finds, after due consideration of the same and the arguments of counsel being fully advised, that said demurrer should be sustained and the said motion sustained in part. And the parties having appeared in court by their respective attorneys, it is thereupon ordered that the demurrer of defendant James F. Toy be and the same hereby is sustained, and to this finding and order the plaintiff excepts. And it is further ordered that the motion of the defendant Sioux National Bank to divide the petition of plaintiff and make the same more specific be and the same is hereby sustained so far as to require the plaintiff to state his cause of action for usury in one count, and also to state his cause of action for a deposit in a separate count, and also to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action, and otherwise said motion is overruled; to all of which each party excepts."

Clerk will here copy in full amendment to petition, May term, 1897, which is divided into count first, count second, and count three, and the Exhibits "A" and "B" thereto attached and made a part thereof in counts one and two.

Exhibit "A" being a copy of a real estate mortgage note made by plaintiff D. H. Talbot to "A. S. Garretson or bearer, '(in)' the principal sum of twenty-eight thousand dollars, with interest thereon at the rate of eight per cent. per year from March, 1890, until maturity, payable semi-annually, according to the tenor of ten interest notes each for eleven hundred twenty dollars bearing even date
13 herewith, both principal and interest notes payable at Sioux national bank with exchange." And as more fully described by the making an exact copy thereof of the entire Exhibit "A" with the several indorsements thereon made by A. S. Garretson on the principal note and the ten interest-coupon notes respectively.

Exhibit "B," made a part thereof in like manner as Exhibit "A," is an "indenture of mortgage made and entered into this first day of March, A. D. 1890, by and between D. H. Talbot, unmarried, of the county of Woodbury and State of Iowa, party of the first part,

and A. S. Garretson, of the county of Woodbury and State of Iowa, party of the second part," in the sum of twenty-eight thousand dollars and interest secured by this said mortgage upon certain thereindescribed lands lying and being in the county of Plymouth and State of Iowa, representing a total of 3,290.57 acres, and as more specifically described in the instrument itself, which was acknowledged before C. L. Joy, notary public in and for Woodbury county, Iowa, the first day of March, 1890, and filed for record in the Plymouth county book of records the 5th day of March, 1890, at 8 o'clock, a. m., and as shown by the appearance docket of Woodbury county, Iowa, the hereinbefore-described amendment to petition and the Exhibits "A" and "B" as therein stated and here specially referred to was, as therein recorded, filed the 20th day of May, 1897. The said amendment to petition, with its Exhibits "A" and "B" above described as copied in full, is in words and figures as follows:

"In the District Court in and for Woodbury County, Iowa, May Term, 1897.

"D. H. TALBOT, Plaintiff,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant.

"*Amendment to Petition.*

"Comes now the plaintiff in the above-entitled action, and by leave of the court amends his petition as follows:

"*Count First.*

"Paragraph 1st. That on or about the 27th day of May, 14 1889, the plaintiff herein commenced doing business with the defendant bank by borrowing money of said bank, depositing money in said bank, drawing checks for the payment of money on said bank in the customary and ordinary way of transacting business between banks and customers and patrons thereof. And that plaintiff continued doing business with defendant bank as aforesaid until said bank failed or closed its doors, on or about the 27th day of August, 1896.

"Par. 2. That during the time plaintiff was doing business with the defendant bank as aforesaid, the said defendant bank, without the knowledge or consent of plaintiff, did knowingly and unlawfully reserve and charge a greater rate of interest on the money borrowed and received by plaintiff from said bank than that allowed by the laws of the State of Iowa. That the amount of said unlawful interest reserved and charged by said bank amounts to more than one dollar, but the exact amount thereof plaintiff cannot at this time state or set forth, neither can he set forth or state the dates, at which the several items of said unlawful interest *was* by the defendant bank reserved and charged, because the books, accounts, records and papers in which the accounts and business transactions between

plaintiff and said bank were made and recorded are in the custody, possession and control of the defendant bank, its officers and representatives, to which plaintiff has not now and never has had access or the privilege of examining.

" Par. 3. That on or about the 24th day of February, 1890, the defendant bank did add to the amount of plaintiff's legitimate indebtedness the several sums and items of unlawful and usurious interest, reserved and charged by it against the plaintiff herein, together with a further sum of two thousand dollars to be advanced to plaintiff in the future, the total amount of which was ten thousand dollars, which sum defendant wrote in a promissory
15 note due on the 30th day of June, 1890, drawing interest at the rate of ten per cent. from date, and a further sum as attorney's fees, which note, when prepared by the defendant as aforesaid, plaintiff signed and delivered to defendant bank, and was a renewal of past and prior indebtedness of plaintiff, and included, continued and contained all of the illegal and usurious interest charged prior thereto by defendant against the plaintiff.

" Par. 4th. That as collateral to and security for the payment of the ten-thousand-dollars note aforesaid, plaintiff assigned to defendant bank all of his equity in eighty-one railroad land contracts covering three thousand two hundred and ninety and $\frac{57}{100}$ acres of land in Plymouth county, Iowa, which railroad land contracts were delivered to the defendant along with and as a part of the same transaction of the making of the aforesaid note.

" Par. 5th. That afterwards, to wit: on or about the 4th day of March, 1890, the plaintiff herein executed and delivered to the defendant bank a certain non-negotiable promissory note for twenty-eight thousand dollars, which note was given to cover all of plaintiff's indebtedness to defendant bank, to wit: fourteen thousand five hundred dollars, in a draft, to pay on certain railroad lands; the ten-thousand-dollar note herein mentioned before, and the unlawful and usurious interest knowingly reserved and charged prior thereto, and continued in said ten-thousand-dollar note aforesaid and continued and renewed in the twenty-eight-thousand-dollar note; that by reason of the unlawful and usurious interest being continued and included in the said twenty-eight-thousand-dollar note, the same being tainted, was and is an unlawful and usurious note. (A copy of said note is hereto annexed, marked Exhibit 'A,' and made a part hereof.)

" Par. 6th. That to secure the payment on the twenty-
16 eight-thousand-dollar note, the plaintiff, on said 4th day of March, 1890, executed and delivered to the defendant herein a certain mortgage on three thousand two hundred and ninety and $\frac{57}{100}$ acres of land in Plymouth county, Iowa. (A copy of said mortgage is hereto attached, marked Exhibit 'B,' and made a part hereof.) That said mortgage was duly filed for record on the 5th day of March, 1890, in the office of the recorder of deeds and mortgages in and for Plymouth county, Iowa, and on same day recorded in Book 6, on page 382, of mortgage records.

" Par. 7th. That the above note and mortgage which were made

upon the 4th day of March, 1890, did include the $10,000 illegal and unearned note, and interest to the amount of $17.10; and which said note and mortgage were made to date back and to bear date of March 1, 1890, thereby increasing the rate of interest on the $10,000 note to about 14 per cent. per annum; and which said illegal, unlawful and usurious interest was knowingly reserved and charged by the defendant and included in and is a part of the $28,000 note aforesaid.

"Par. 8th. That the said defendant bank knowingly and unlawfully reserved and charged plaintiff with unlawful and usurious interest, amounting to more than $1, prior to the making of said ten-thousand-dollar note aforesaid, and that said unlawful and usurious interest so reserved and charged as aforesaid was put into and was included in said $10,000 note, which fact caused a forfeiture of all of the interest due or to become due from plaintiff to defendant in said transaction, as provided in sections 5197 and 5198 of the Revised Statutes of the United States, which are as follows:

"'SEC. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws
17 of the State, Territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, Territory, or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill or other evidence of debt has to run. And the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.'

"'Penalty for taking usurious interest.—SEC. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.'

"Par. 9th. That the unlawful and usurious interest knowingly reserved and charged by said defendant bank against the plaintiff herein, together with the interest which in law and in fact was and is forfeited but was unlawfully and wrongfully put in a pretended judgment against plaintiff herein in a certain case entitled
18 J. W. White *vs.* D. H. Talbot *et al.*, in the district court of Plymouth county, Iowa, and the forfeited interest which has

since *incurred* amounts in all to about nine thousand dollars; the exact amount plaintiff cannot state for the reason the accounts, books, papers and records of said business between plaintiff and defendant bank, is in the custody and possession of said defendant and to which plaintiff has no access; and which amount of nine thousand dollars is due and owing to the plaintiff from the defendant.

Count Second.

"The plaintiff, as and for a second count of and to his amendment to his original petition filed herein, states:

"Par. 1st. That on or about the 27th day of May, 1889, plaintiff commenced doing business with defendant bank, who was then and is now a national bank, created, organized and existing under and by virtue of the laws of the United States, and as such national bank was then and is now subjected to and controlled by the laws of the United States and State of Iowa. That after the plaintiff commenced business with defendant bank, and before the 24th day of February, 1890, defendant knowingly had reserved from and charged plaintiff with usurious and unlawful interest, amounting to more than one dollar, which unlawful and usurious interest the defendant knowingly and unlawfully and without plaintiff's knowledge or consent, included in a ten-thousand-dollar note signed by plaintiff on said 24th day of February, 1890, payable June 30th, 1890, and bearing interest at the rate of ten per cent. per annum, and the customary attorney's fees for defendant's attorney.

"Par. 2. That on or about the 4th day of March, 1890, the defendant bank furnished plaintiff a further sum of money which it then added to the unlawful and usurious interest prior thereto reserved from and charged to the plaintiff without his knowl-
19 edge or consent, and as evidence thereof put said usurious and unlawful interest, reserved and charged as aforesaid, together with the further sum then and there furnished plaintiff into a non-negotiable promissory note for twenty-eight thousand dollars, due March 1st, 1895, but wrongfully and without consent of plaintiff dated said note on March 1st, 1890, instead of March 4th, 1890, the actual and true date thereof. That the reserving and charging of said unlawful and usurious interest, and including the same in said note, worked a forfeiture of all of the interest in said note and the business transaction between plaintiff and defendant. That the unlawful and forfeited interest represented in said twenty-eight-thousand-dollar note was $13,125.40, and that said note should have been only for $14,874.60, as governed by sections 5197 and 5198 of the Revised Statutes of the United States, which sections are set forth in paragraph 8 of the first count of this amendment, and by reference is made a part thereof.

"Par. 3. That to secure the payment of the said $28,000 note aforesaid, on said 4th day of March, 1890, the plaintiff herein executed and delivered to the defendant bank a certain real-estate mortgage, which mortgage was wrongfully and without the direction or the consent of the plaintiff dated March 1st, 1890, instead of

March 4th, 1890, the true date thereof. (A copy of said mortgage is hereto attached to this amendment, marked Exhibit 'B,' and made a part hereof.) That said mortgage was filed for record on the 5th day of March, 1890, in the office of the recorder of deeds and mortgages in and for Plymouth county, Iowa, and on the same day recorded in Book 6, on page 382, of mortgage records.

"Par. 4. That, as plaintiff is informed and believes, the defendant bank in some manner wrongfully and unlawfully, unknown to the plaintiff, and without his knowledge or consent, delivered
20 said mortgage and note to one J. W. White, a stockholder in and of the defendant bank, who afterwards, unlawfully and before said note was due and payable, commenced a foreclosure proceedings in the district court of Plymouth county, Iowa.

"Par. 5. Plaintiff further states that upon May 4th, 1890, at the time of making the $28,000 note and mortgage aforesaid, Wm. L. Joy, the senior member of the firm of attorneys, Joy, Hudson, Call & Joy, was president of the present defendant bank; that the said A. S. Garretson, the payee of said note and mortgage, was the cashier thereof, and that the said J. W. White was a very large holder of stock in said Sioux national bank; and, further, that these respective parties in interest did conspire with a view to the bringing about a foreclosure and by this means adjudicate the liabilities which they would bear under the provisions of section 5329, Revised Statutes, because of the knowingly reserving and charging of unlawful and illegal interest as heretofore set out in this amended petition. And that said interested parties, as officers or agents of the said bank, unlawfully and with the intent to impose upon the court, by fraudulent representations to the honorable judge of the district court in Plymouth county, Iowa, set out in their petition for said foreclosure the right and justice of foreclosure upon the sole ground of nonpayment of interest, which interest they, individually and collectively, had full knowledge of having been reserved and charged and of which the defendant in said proceedings was without knowledge at that time, and the said interest was forfeited under the provisions of section 5197 and 5198 of Revised Statutes.

"Par. 6. That the said J. W. White, in pursuance of the conspiracy formed with the said A. S. Garretson and W. L. Joy as aforesaid, and for the purpose of misleading and deceiving said district court and causing it to assume jurisdiction in said case,
21 wrongfully and unlawfully, suppressed the fact that said twenty-eight-thousand-dollar note contained unlawful and usurious interest, and that all of the interest in said note and the indebtedness of the plaintiff to defendant and said Garretson had been forfeited, and suppressed the fact that said note had lost its interest-bearing power and was not due, and that no right of action then existed, and suppressed the fact that the court had no jurisdiction to try or hear said cause or render judgment therein.

"Par. 7. The plaintiff further states that on or about the 9th day of April, 1891, the said J. W. White, A. S. Garretson, W. L. Joy, and the firm of Joy, Hudson, Call & Joy, and the defendant bank, did wrongfully and unlawfully combine, conspire and confederate to-

gether to and did cause an action to be commenced and proceedings to be instituted against the plaintiff herein, and the land described in said Exhibit "B," in the district court of Plymouth county, Iowa, in the name of said J. W. White, instead of the name of the defendant herein, The Sioux National Bank, the real party in interest. That said action was so commenced in the name of said J. W. White for the purpose of avoiding and evading the force and effect of the sections of the Revised Statutes of the United States here-before set forth and referred to in this amendment.

"Par. 8. That afterwards, to wit: on or about the 6th day of May, 1891, judgment was rendered in said district court in and for Plymouth county, Iowa, against the plaintiff herein, for thirty-one thousand and eighty-six dollars and fifty cents, including therein attorneys' fees, and the unlawful and usurious interest, and the forfeited interest hereinbefore mentioned and referred to, and also the foreclosure of the lands described in the mortgage, a copy of which is hereto attached and marked Exhibit "B," and that said lands were afterwards sold on special execution to satisfy said judgment
22 and all bid in and purchased by C. L. Joy, a director of defendant bank and also a member of the firm of Joy, Hudson, Call & Joy, for said plaintiff J. W. White, except one tract of forty acres which was sold to one E. A. Smith and D. A. Williams, one forty acres to Bartholomew Poredek, one forty acres to Christ Munch, and one forty acres to Christian Larson; and that afterwards deeds were issued to the respective purchasers of said land by the sheriff of Plymouth county, Iowa, and that said sheriff's deeds have since been duly recorded in the office of the recorder of deeds of Plymouth county, Iowa, in the manner required by law.

"Par. 9. That the court, in rendering its judgment, relied on the statements of counsel for plaintiff, and the allegations of the petition, and believing the same to be true, and not knowing that said petition and claim of plaintiff included the usurious, unlawful and forfeited interest hereinbefore set forth and mentioned, and not being advised or knowing that all of the interest on said note had been forfeited, was deceived and misled by the said fraud practiced upon it by the defendant herein, the said J. W. White, plaintiff in said cause of action, and the attorneys representing said plaintiff, and was thereby induced to and did render its judgment for the sum of $13,125.40 more than would be actually due at maturity of said note and mortgage, to wit: March 1st, 1895.

"Par. 10. The plaintiff further states, that the district court in and for Plymouth county, did not have jurisdiction over the plaintiff herein or the property described in Exhibit "B" hereto attached, at the term said court rendered the judgment aforesaid, because all of the interest on said $28,000 note had been forfeited and its interest-bearing power killed and destroyed by reason of the facts hereinbefore stated. And the unlawful, usurious and forfeited interest which had been reserved and charged against the plaintiff herein and included in said note, therefore the said note was
23 in fact not due. And said judgment, decree of foreclosure,

the issuance of the execution on said judgment, and the making of the sheriff's deed aforesaid, were and are illegal and void.

"Par. 11. That the said J. W. White and the defendant herein unlawfully, wrongfully, and without the knowledge or consent of the plaintiff, forcibly, on or about the 31st day of May, 1894, took possession of the lands and property described in aforesaid Exhibit "B," and has forcibly held possession ever since, causing the plaintiff herein to suffer and sustain damages by being deprived of the use and occupation and benefits of said premises and the reserving and charging of the unlawful and usurious interest heretofore mentioned in the approximate sum of $31,000.

"*Count Three.*

"Comes now the plaintiff, and by the way of third count of plaintiff's amendment to his original petition filed herein states:

"Par. 1. That there is a balance due and owing to plaintiff for money deposited in said bank, the sum of $173.11, which has never been drawn or checked out of said bank, and that the same is now the property of the plaintiff herein.

"Wherefore, plaintiff demands judgment against The Sioux National Bank, defendant herein, on the first count of this amendment in the sum of nine thousand dollars and interest from May 31st, 1893. And on the second count plaintiff demands judgment in the sum of $13,125.40, and an additional sum of $13,125.40 as a penalty provided for by sections 5197 and 5198, Revised Statutes of the United States, together with the interest thereon; and for the further sum of $173.11 on the third count of the amendment.

"Plaintiff also prays the court to make an order permitting the plaintiff or any one else representing him to examine and
24 take extracts and copies therefrom of the books, accounts and papers under the control of one Jonathan W. Brown, who has since the commencement of this suit been appointed receiver of said bank, and for costs in this case."

(Duly verified.)

EXHIBIT "A"

Real-estate Mortgage Note.

On or before the 1st day of March, 1895, for value received, I promise to pay A. S. Garretson, or bearer, the principal sum of twenty-eight thousand dollars, with interest thereon at the rate of eight per cent. per year, from March first, 1890, until maturity, payable semi-annually, according to the tenor of ten interest notes, each for eleven hundred twenty dollars, bearing even date herewith, both principal and interest notes payable at Sioux national bank with exchange.

And if default be made in the payment of any of said notes so secured or any part of them, as the same matures, for the space of thirty days, or if the maker of this note and interest notes attached hereto, shall allow the taxes or any other public rates or assessments

on the property or any part hereof, given as security for the aforesaid notes, to become delinquent, or shall do any act whereby the value of said mortgaged property shall be impaired, then upon the happening of any such contingencies, the whole amount herein secured shall at once be and become due and payable, and the mortgagee, his legal representatives or assigns, may proceed at once to collect this note and foreclose the mortgage given to secure said note and sell the mortgaged property or so much thereof as shall be necessary to satisfy said debt, interest and costs, and all taxes, rates or public assessments that may be due thereon, together with a reasonable attorney fee, if suit be commenced for the purpose of collecting this debt, or foreclosing the mortgage securing said debt, and also said taxes, public rates, assessments and costs incurred by the mortgagee, his representatives or assigns, shall be secured by mortgage and also included in judgment in such foreclosure case. It is expressly agreed and declared that these notes are made and executed under and are in all respects to be construed by the laws of the State of Iowa, and are secured by mortgage of even date herewith duly recorded in Plymouth county, of the State of Iowa.

This note bears interest at the rate of eight per cent. per year, payable half yearly after maturity.

Dated at Sioux City, Iowa, on the first day of March, 1890.

(Signed) D. H. TALBOT.

Endorsement: Protest waived. A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1895, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1894, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1893, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the in-

terest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

26 $1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1892, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest on my principal note of $28,000.00 of even date herewith. This note bears interest at the rate of eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of March, 1891, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1894, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1893, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

27 On the first day of Sept., 1892, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1891, for value received, I promise to *pay to the order of A. S. Garretson*, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

$1,120.00. SIOUX CITY, IOWA, *March 1st*, 1890.

On the first day of Sept., 1890, for value received, I promise to pay to the order of A. S. Garretson, eleven hundred twenty dollars, at Sioux national bank, with exchange on New York, being the interest due on my principal note of $28,000.00 of even date herewith. This note bears interest at eight per cent. per year after due.

D. H. TALBOT.

(Endorsement:) A. S. Garretson.

EXHIBIT "B."

"This indenture of mortgage, made and entered into this first day of March, 1890, by and between D. H. Talbot, unmarried, of the county of Woodbury and State of Iowa, party of the first part, and A. S. Garretson, of the county of Woodbury and State of Iowa, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, and of the indebtedness hereinafter mentioned, has given, granted, bargained, sold and conveyed, and by these presents does give, grant, bargain, sell and convey unto said party of the second part, his heirs and
28 assigns forever, the following-described pieces or parcels of land lying and being in the county of Plymouth and State of Iowa, to wit:

"The east one-half, the southwest qr. and the south half of the northwest qr. of sec. No. five (5), the west half of sec. No. seventeen (17), the west half of northwest qr., northeast quarter of the northwest qr. and west half of southwest qr. of sec. No. nineteen (19), all in township No. ninety (90) north, of range No. forty-seven (47), west of the 5th P. M., Iowa.

"All of sec. No. one (1), the southeast qr. and the south half of northeast qr. of sec. No. three (3), the southeast qr., north half of northeast qr. and southwest qr. of the northeast qr. of sec. No. thirteen (13). the northwest qr. of northeast quarter of southeast qr. and south half of southeast qr. of sec. No. fifteen (15), all in tp. No. ninety (90) north, of range No. forty-eight (48), west of the 5th P. M., Iowa. The south half and the northwest qr. of sec. No. thirty-one (31), in tp. No. ninety-one (91), north, of range No. forty-seven (47), west of the 5th P. M., Iowa. The south half and south half of southwest qr. of northeast qr. of sec. No. thirty-five (35), in tp. No. ninety-one (91), north, of range No. forty-eight (48), west of the 5th P. M., Iowa. Containing in all three thousand two hundred ninety and fifty-seven-hundredths (3,290.57) acres of land, more or less.

"With all the appurtenances and improvements thereto belonging. To have and to hold the same to the party of the second part, his heirs and assigns forever, hereby covenanting that the said party of the first part, at the time of the delivery of these presents, is well seized of the premises above described, of perfect, absolute and indefeasible state of inheritance in the law, in fee-simple, and that the same are free and clear of all incumbrance whatever, and that he will ever warrant and defend the same to the party of the second part, his heirs and assigns, against all claims whatsoever.

29 "And the said party of the first part hereby relinquishes all his right of homestead in and to the above-described premises.

"This grant is intended as security for the payment of one certain promissory coupon note for $28,000.00 bearing date March first, 1900, executed by D. H. Talbot, the said party of the first part, to the party of the second part, and drawing interest at the rate of eight per cent. per annum, until paid, for the sum of twenty-eight thousand dollars, interest payable semi-annually, on the first day of March and September of each year, as per coupon interest notes attached, payable at Sioux national bank, and is intended to be secured by this mortgage, and the said party of the first part hereby agrees to pay all taxes that have been or may be assessed upon said premises, and in case it shall become necessary for a party of the second part, his heirs or assigns, to pay the taxes or insurance of the aforesaid property, the party of the first part hereby agrees to refund to the party of the second part, his heirs or assigns, all sums so expended, with interest at the rate of eight per cent. per annum, and this mortgage shall be security for all sums so expended.

"Now, therefore, if the said party of the first part shall well and truly pay or cause to be paid the said promissory note, including the principal and interest thereon, as aforesaid, at the time promptly as aforesaid, that this indenture shall be null and void, else of full force and virtue.

"If the said party of the first part shall fail to pay any portion of the above-mentioned sums, either principal or interest, promptly at the times they shall become due, respectively, as aforesaid, or shall neglect to pay all taxes assessed or to be assessed on said property, before the same shall become delinquent, or shall neglect to keep the buildings on said property insured as herein specified, then the whole sum, both principal and interest, shall at once become

30 due and collectible, and in that case said party of the second part, either by himself or agent, shall have the right to enter upon and take possession of said premises and sell the same in the manner now, or that may hereafter be, provided by law, and out of the proceeds of such sale, first paying the expenses thereof, including two hundred dollars as attorney's fees and all expenses whatsoever that may accrue by reason of such sale, then deducting therefrom the amount of said debt and interest and all the aforesaid taxes and insurance, with interest thereon at the rate aforesaid, rendering unto said party of the first part the surplus if any. And it is ex-

pressly understood and agreed that said second party may become the purchaser at said sale if he so choose.

"And in case of foreclosure of this mortgage or the commencement of foreclosure, the said party of the first part, his heirs, representatives and assigns, covenant and agree that he will pay to said party of the second part, his representatives or assigns, in addition to the taxable costs and expenses in the foreclosure suit, the said sum of two hundred dollars as attorney's fees.

"In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

"D. H. TALBOT. [SEAL.]

"STATE OF IOWA, } ss:
County of Woodbury, }

"Be it remembered, that on the first day of March, in the year one thousand eight hundred and ninety, before me, C. L. Joy, a notary public within and for said county and State, personally appeared D. H. Talbot, unmarried, to me personally known to me to be the person who is described in and who executed the within and foregoing instrument, and he duly acknowledged to me that he executed the same, freely and voluntarily.

"In witness whereof, I have hereunto set my hand and official seal, at said county, the day and year above written.

"[SEAL.] C. L. JOY,
"*Notary Public.*

31 "Filed for record the 5th day of March, A. D. 1890, at 8 o'clock, a. m.

"WALLACE WINSLOW, *Recorder.*

"STATE OF IOWA, } ss:
Plymouth County, }

"I, G. W. McLain, recorder of Plymouth county, Iowa, do hereby certify that the foregoing is a true and complete copy of the records found in Book 6, page 382, of mortgage records of Plymouth county, Iowa, and has been duly compared.

"Dated Lemars, Iowa, Jan. 2, 1897.

"G. W. McLAIN, *Recorder.*
"LIZZIE B. BURKE, *Deputy.*"

And to which defendant bank demurred to the first and second counts of plaintiff's said amended petition, in words and figures as follows:

"Now comes the defendant to the above-entitled cause and demurs to the first count of plaintiff's amended petition filed herein May 20th, 1897, and to each and every paragraph thereof and hereof shown to the court as causes for demurrer:

"1st. That said petition is filed in an action in law, and said count is improperly divided into paragraphs.

"2nd. That said count of said petition purports to be for the recovery of unlawful interest alleged to have been taken by defend-

ant, and it appears from said count that plaintiff has paid defendant no interest.

"3rd. That it does not appear from said count of said petition what the action is brought for.

"4th. That said count contains no demand or claim for any sum against defendant.

"5th. That said count purports to be for the recovery under the provisions of sections 5197 and 5198, Revised Statutes of the United States, and does not state a cause coming within the provisions of said statutes.

"6th. That plaintiff, in said count, has failed to comply
32 with the former order of the court in this case to make his petition more specific.

"7th. The matters and things set out in said count and the several paragraphs thereof do not constitute in law a right of action against defendant, nor entitle plaintiff to recover.

"8th. That the matters set out in said petition are principally conclusions and not facts.

"And defendant demurs to the second count of plaintiff's said amended petition and to each and every paragraph thereof for and upon all the grounds heretofore stated as causes for demurrer to the first count thereof, and further:

"1st. That said action is barred by the limitations prescribed in section 5198, Revised Statutes of the United States, under which said action purports to be brought.

"2nd. That the note and mortgage made part of the petition contradicts the statement in petition that the same were executed to defendant and shows that defendant was not a party to the alleged usurious transaction."

And which demurrer to first and second counts of plaintiff's amended petition was ruled upon by the court, as shown by the District Court Record No. 35, on page 185, in words and figures as follows:

"And now, to wit: January 4, 1898, it being the 48th day of the regular October, 1897, term of this court, this cause comes on for hearing upon the demurrer of the defendant, The Sioux National Bank, to plaintiff's petition, the said defendant appearing by its attorney, J. S. Lothrop, and the plaintiff appearing by his attorney, G. W. Argo; and the said demurrer being fully submitted, the court finds, being advised, that the demurrer should be sustained. It is therefore ordered and adjudged that the defendant's demurrer be and the same is hereby sustained, to which ruling the plaintiff excepts and is given fifteen days in which to amend."

33 And following said order, as it is shown by the record in the District Court Record No. 35, on page 195, it was ordered by the court in words and figures as follows:

"And now, at this time, this cause coming on in its order, and the parties appearing by counsel, it is ordered by the court that the plaintiff have until February 11, 1898, to amend his petition."

And upon the 8th day of February, 1898, the court made an order in words and figures as follows:

"And now, at this time, February 8th, 1898, this cause being called and the parties appearing by their respective attorneys and consenting thereto, the plaintiff is given until April 15, 1898, to file amendment to his petition."

And the above being all the pleadings, all the evidence, all the motions, all the demurrers, and all the objections and exceptions thereto and rulings thereon, and being a full and complete record of all the proceedings had upon the trial of said cause, plaintiff asks the court to sign this his bill of exceptions, and make the same a part of the record in said cause, which is done accordingly.

Dated this 4th day of August, 1898.

F. R. GAYNOR, *Judge.*

And following the filing of foregoing bill of exceptions August 5, 1898, a motion was filed August 26, 1898, by defendant, in words and figures as follows:

"Now comes the above-named defendant and moves the court for a rule upon the plaintiff, D. H. Talbot, to amend count three of his petition filed herein by making the same more specific, as directed by the order of this court heretofore entered in said cause, and that such amendment be made within five days from the service of notice hereof."

Upon which the court ruled September 17, 1898, at the August term, in words and figures as follows:

34 "Now at this time, to wit: September 17, 1898, this cause being called for further hearing, the plaintiff appears by his attorneys Geo. W. Argo and W. J. Sweeley, and defendant appears by its attorney J. S. Lothrop, and thereupon, on motion of defendant, it is ordered that the plaintiff amend the third count of his amended petition by making the same more specific, as required by a former order of this court, on or before September 27, 1898."

And following, on September 29, 1898, at the August term, the decree of the court was in words and figures as follows, as shown by the District Court Record of Woodbury County No. 35, on page 492:

"Now, at this time, to wit: September 29, 1898, this cause being called in its order, the defendant appears by its attorney, J. S. Lothrop, and the plaintiff having heretofore elected to stand upon his amended petition and the record made by the rulings of the court upon demurrer, motion for rehearing and the motion to make the third count of plaintiff's amended petition more specific; and having failed to further plead, so standing on the amended petition and record; it is now ordered by the court, that the petition as amended and the cause of action be and they are hereby dismissed, at the costs of the plaintiff. It is further ordered and adjudged that the defendant have and recover of and from the plaintiff the costs of this action, taxed at $—, and that execution issue therefor. And to this ruling and judgment of the court the plaintiff excepts."

Notice of appeal from such decree and judgment of the court was served in words and figures as follows:

In the District Court of the State of Iowa in and for Woodbury County.

D. H. TALBOT, Plaintiff,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant.

35 *Notice of Appeal.*

To the above-named Sioux National Bank and its attorney, J. S. Lothrop, and W. S. Belden, clerk of said court:

You are hereby notified that the plaintiff, D. H. Talbot, in said action has appealed from his election made May 13, 1898, and recorded in the District Court Record No. 35, on page 395, to stand on the record theretofore made and not to plead further, upon his amended petition and the rulings made by the court on defendant's demurrer, motion for rehearing and the motion to make the third count of his petition more specific; and from the judgment of the district court of the State of Iowa, in and for Woodbury county, rendered in favor of the defendant at the August, 1898, term thereof, on the 29th day of September, 1898, to the supreme court of Iowa; and that said appeal will come on for hearing and trial in said court at the January, 1899, term to be held at Des Moines, Iowa, commencing on the third Tuesday, being the 17th day of January, 1899.

D. H. TALBOT.

Dated October 12, 1898.

STATE OF IOWA, *Woodbury County,* } ss:

The undersigned, to whom the within notice is directed, hereby acknowledges due, complete and legal service of the within notice upon each of us, on this 12th day of October, A. D. 1898, in said county.

J. S. LOTHROP,
Attorney for Sioux National Bank.
W. S. BELDEN,
Clerk of District Court in and for Woodbury Co.

And subsequently filed in the office of the clerk of the district court of Woodbury county, the 12th day of October, 1898.

The foregoing abstract contains all the pleadings of both plaintiff and defendant submitted to the court in said cause and the
36 rulings of the court thereon, and the exceptions taken thereto by both plaintiff and defendant; which pleadings, rulings and exceptions were by said bill of exceptions duly signed by the trial judge and filed in the office of the judge and the clerk of the district court of Woodbury county, Iowa, and within the prescribed time made a part of the record in this cause; and that subsequent thereto defendant, on August 26, 1898, filed a motion for further hearing, and the ruling thereon by the court bearing date of Sep-

tember 17, 1898, and the final judgment of the court bearing date of September 29, 1898, and plaintiff's exceptions thereto, and proper notice of appeal and the filing thereof with the clerk of the district court of Woodbury county, Iowa, each and all of these respective additions to the pleadings in this cause are also herein copied and made a part of this record.

Assignment of Errors.

The appellant assigns errors as follows:

1. The court erred in sustaining defendant's motion to elect to divide and make more specific (Abstract, pp. 10 and 11), in the following words: "And it is further ordered that the motion of defendant, Sioux National Bank, to divide the petition of plaintiff and make the same more specific be and the same is hereby sustained so far as to require the plaintiff to state his cause of action for usury in one count and also to state his cause of action for a deposit in a separate count, and also to state the amount claimed as usury that was paid within two years next prior to the commencement of this cause of action, and otherwise said motion is overruled; to all of which each party excepts" (Abstract, p. 12). And for the reason as stated in plaintiff's petition (Abstract, pp. 6, 7 and 8), of which the following is a part: "That at the present time the books, checks, vouchers and accounts, and other evidences of the dealings and business had between plaintiff and defendant are in the hands of one
37 Jonathan W. Brown, who claims to be the receiver of said defendant bank, and that said Brown, as receiver, and having possession of said books and accounts, declines and refuses to allow plaintiff to examine said books and accounts between plaintiff and defendants, and refuses to furnish plaintiff with a copy of said account or an itemized statement showing the different items and full accounts between the parties of this action. And, therefore, the plaintiff is unable to attach to his petition an exhibit showing the full account between him and defendants, and is also for the same reason unable to incorporate in this petition such statement or bill of particulars" (Abstract, p. 7). * * * "And also prays this honorable court to make an order that plaintiff may have the opportunity to inspect and examine the books and accounts wherein are entered and kept the dealings and business transactions between plaintiff and defendant and take a certified copy of said account in order that same may be used upon trial of said case and as an exhibit to plaintiff's petition" (Abstract, p. 8). And further, that the court made an impossible demand because, when all said books, papers and accounts were kept entirely away from the knowledge of plaintiff, the exact facts could not, nor can they now, be learned and given by plaintiff into the hands of the court.

2. The court erred in sustaining defendant's demurrer (Abstract, pp. 31, 32) to the first and second counts of amendment to petition (Abstract, pp. 13 to 31) without at the same time and in like manner ruling on the motion to strike from amended petition and to make more specific" (Abstract, pp. 1 and 2), and for the like reasons as

set out in plaintiff's petition (Abstract, pp. 6, 7 and 8), and specifically copied in assignment of error number 1 preceding, and also as stated in paragraph 2 of count one of amendment to petition (Abstract, p. 14), and in paragraph 1, count two, of amendment to petition (Abstract, p. 18), wherein it is fully shown that the greater rate of interest than allowed by the laws of the State of Iowa was charged or otherwise taken without the knowledge or consent of plaintiff, and that the several items of said unlawful interest could not be learned owing to the books, accounts, records and papers showing such unlawful charging of interest, plaintiff had no access to nor privilege of examining, and that a full accounting should have been ordered that plaintiff might thereby demand full relief.

38

3. The court erred in sustaining the first cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said petition is filed in an action at law, and such count is improperly divided into paragraphs" (Abstract, pp. 31, 32). And for the following reasons: That there is no prohibition by statute against pleading in the manner objected to; nor in any sense is it detrimental in presenting the subject-matter before the court.

4. The court erred in sustaining the second cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said count of said petition purports to be for the recovery of unlawful interest alleged to have been taken by defendant, and it appears from said count that plaintiff has paid no interest" (Abstract, pp. 31, 32), and for the reasons: That under sections 5197 and 5198, Revised Statutes, where the charge of the greater rate of interest is made than is allowed by the laws of Iowa, it is not necessary, for the purpose of showing a forfeiture of the entire interest which the account, note, bond or other evidence of debt would otherwise bear, to plead that the greater rate had been paid.

5. The court erred in sustaining the third cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That it does not appear from said count of said petition what the action is brought for" (Abstract, pp. 31, 32), and for the reasons: That it is clearly shown by paragraph 2 of amended petition (Abstract, p. 14), and the remaining paragraphs or sections of said amended petition that it was and is for the forfeited interest and penalty incurred by defendant in violation of sections 5197 and 5198, Revised Statutes.

39

6. The court erred in sustaining the fourth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said count contains no demand or claim for any sum against defendant" (Abstract, pp. 31, 32), and for the reasons, as stated in said count one (Abstract, p. 18): "The exact amount plaintiff cannot state for the reason the accounts, books, papers and records of said business between plaintiff and defendant bank is in the custody and possession of said defendant and to which plaintiff has no access;" and for the further reason that judgment on this count is asked for in the prayer (Abstract, p. 23).

7. The court erred in sustaining the fifth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That said count purports to be for the recovery under the provisions of sections 5197 and 5198 Revised Statutes of the United States, and does not state a cause coming within the provisions of said statutes" (Abstract, pp. 31, 32), and for the reasons: That it is fully shown by paragraph 2 (Abstract, p. 14) and remaining paragraphs or sections of said count that the greater rate of interest than was allowed by the laws of Iowa was charged into the account and from said account entered into notes and bonds, as against the provisions of said sections 5197 and 5198, Revised Statutes, without plaintiff's knowledge or consent.

40 8. The court erred in sustaining the sixth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That plaintiff, in said count, has failed to comply with the former order of the court in this case to make his petition more specific" (Abstract, pp. 31, 32), and for the reasons: That defendant charged plaintiff the greater rate without his knowledge (par. 2, Abstract, p. 14), and regardless of its legal notice and of the pleadings praying for an opportunity to learn the facts, additional to this specific knowledge, and thus called to the court's attention, the court did not see proper to grant the request as just and lawful.

9. The court erred in sustaining the seventh cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "The matters and things set out in said count and the several paragraphs thereof do not constitute in law a right of action against defendant, nor entitle plaintiff to recover" (Abstract, pp. 31, 32), and for the reasons: That the entire proceedings connected with said count and the paragraphs thereof deny and nullify the statement made in this cause of demurrer.

10. The court erred in sustaining the eighth cause of defendant's demurrer to plaintiff's count one of his amended petition, which is as follows: "That the matters set out in said petition are principally conclusions and not facts" (Abstract, 31, 32), and for the reason: That the proper remedy upon this statement of the contents or allegations of said count was by motion and not by demurrer.

11. The court erred in sustaining the first cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said petition is filed in an action at law, and such count is improperly divided into paragraphs" (Abstract, pp. 31, 32), and for the following reasons: That there is no prohibition by

41 statute against pleading in the manner objected to; nor in any sense is it detrimental in presenting the subject-matter before the court.

12. The court erred in sustaining the second cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said count of said petition purports to be for the recovery of unlawful interest alleged to have been taken by defendant, and it appears from said count that plaintiff has paid defendant no interest" (Abstract, pp. 31, 32), and for the reasons: That it is

clearly shown by said count the manner in which the usurious or "greater rate" of interest was charged into the accounts, notes and bonds of plaintiff against his knowledge; that the payee of the bonds and coupons after endorsement was cashier of defendant, and that at the option of defendant it elected to sell said mortgage, that the property thus held as security was sold; that said petition further states that the damages incurred by plaintiff "by being deprived of the use and occupation and benefits of said premises and the reserving and charging of the unlawful and usurious interest heretofore mentioned in the approximate sum of $31,000," and in the prayer, judgment is asked in the sum of $13,125.40 (as the forfeited interest) and an additional sum of $13,125.40 as a penalty, provided for by sections 5197 and 5198, Revised Statutes of the United States * * * (Abstract, p. 23), and which is by operation of law a statement of the amount paid.

13. The court erred in sustaining the third cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That it does not appear from said count of said petition what the action is brought for" (Abstract, pp. 31, 32), and for the reasons: It is clearly shown by paragraph 1 (Abstract, p. 18) and the subsequent paragraphs in said count (Abstract, pp. 18 to 31), and the prayer of said count (Abstract, p. 23), that a complete
42 pleading has been made to comply with the provisions of sections 5197 and 5198, Revised Statutes.

14. The court erred in sustaining the fourth cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said count contains no demand or claim for any sum against defendant" (Abstract, pp. 31, 32), and for the reasons: That in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 (Abstract, pp. 18–23), is a statement of a cause of action, and in paragraph 11 and in the prayer (Abstract, p. 23) is defined the claim of $26,250.80 and interest.

15. The court erred in sustaining the fifth cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said count purports to be for the recovery under the provisions of sections 5197 and 5198, Revised Statutes of the United States, and does not state a cause coming within the provisions of said statutes" (Abstract, pp. 31, 32), and for the reasons: That it is fully shown by paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and the prayer thereto (Abstract, pp. 18–23), that the foregoing cause of demurrer is incorrect in that it is charged and no evidence offered to deny the allegation that one dollar and other sums unknown to plaintiff were charged into the account and into notes and subsequently into bonds for which defendant received the benefit, and which was placed in judgment without plaintiff having any such knowledge of the charging of such unlawful interest, and finally by depriving plaintiff of his property without notice to him of such unlawful charge, and by operation of law such greater rate or usurious interest was not paid until plaintiff with knowledge of such unlawful charge by defendant brought this action.

16. The court erred in sustaining the sixth cause of defend-
43 ant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That plaintiff, in said count, has failed to comply with the former order of the court in this case to make his petition more specific" (Abstract, pp. 31, 32), and for the reasons: That defendant charged plaintiff the greater rate without his knowledge (par. 1, Abstract, p. 18), and regardless of the court's duty to take judicial notice and the pleadings praying for an opportunity to discover the facts, additional to this specific knowledge, and thus called to the court's attention, the court's order could not the more definitely be complied with, and by such act of the court deprived plaintiff of the full relief to which he is entitled.

17. The court erred in sustaining the seventh cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "The matters and things set out in said count and the several paragraphs thereof do not constitute in law a right of action against defendant, nor entitle plaintiff to recover" (Abs., pp. 31, 32), and for the reasons: That the entire proceedings which are made a statement of facts, as far as known in said count, and the paragraphs and sections thereof (Abs., pp. 18–23), deny and nullify the statement made in this cause of demurrer.

18. The court erred in sustaining the eighth cause of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That the matters set out in said petition are principally conclusions and not facts" (Abs., pp. 31, 32), and for the reason that the proper remedy upon this statement of the contents of said count was by motion and not by demurrer.

And following the duplicating of like causes of demurrer as heretofore excepted to, to counts one and two respectively, plaintiff continues his grounds for demurrer in the two following numbers (Abstract, p. 32):

19. The court erred in sustaining the first ground of de-
44 fendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That said action is barred by the limitations prescribed in section 5198, Revised Statutes of the United States, under which said action purports to be brought," and for the reasons: That the charge into the account between plaintiff and defendant of the greater rate than was allowed by the laws of Iowa was made without knowledge of plaintiff; it so entered into the subsequently given notes and bonds; defendant elected to dispose of said bonds, including the charge therein of the illegal interest, attorney's fees and other illegal charges, and the purchaser elected to and did ask the cancellation of the entire debt and thus foreclosed solely on account of default in payment of the illegal interest; the court had no jurisdiction to order a foreclosure until the principal or legal debt represented by the bonds were due; the court had judicial knowledge of this injury to plaintiff and when the present action was brought before it, by operation of law, judicial notice should have been exercised under the provisions of section 5198, Revised Statutes, and judgment rendered for double the entire amount of interest contracted to be paid by plaintiff and such other

amounts as might have been found by ordering a general accounting and which was included in such contracts or bonds.

20. The court erred in sustaining the second ground of defendant's demurrer to plaintiff's count two of his amended petition, which is as follows: "That the note and mortgage made part of the petition contradicts the statement in petition that the same were executed to defendant, and shows that defendant was not a party to the alleged usurious transaction," and for the reasons: That A. S. Garretson was cashier of defendant and liable under the national banking law, for losses incurred under sections 5197 and 5198, Revised
45 Statutes, to defendant; that the charge of the greater rate than was allowed by the laws of Iowa was made into the account between plaintiff and defendant prior to March 1, 1890, the date of the making of the bond (Abs., p. 18, par. 1st, and p. 24, Exhibit "A"); the making of the bond to "A. S. Garretson or bearer" did not purge the illegal interest included therein; it did not pass from the defendant until endorsed by the legal holder; by including the illegal interest in the bond or mortgage (Abs., p. 27, Exhibit "B") rendered the coupon notes in the name of A. S. Garretson void and without consideration, and in consequence the entire proceedings in foreclosure were void; the statute of limitations did not begin to run until plaintiff knowingly paid the illegal interest as such.

21. The court erred in sustaining ground first of defendant's motion to strike from amended petition and to make more specific (Abstract, pp. 1, 2 and 4), and for the reasons: Plaintiff moves to strike from said count all after the word "herein," which is as follows: "On the first count of this amendment in the sum of nine thousand dollars and interest from May 31st, 1893, and on the second count plaintiff demands judgment in the sum of $13,125.40, and an additional sum of $13,125.40 as a penalty provided for by sections 5197 and 5198, Revised Statutes of the United States, together with the interest thereon; and" * * * also the word "further" preceding the word sum in the last line, so that this prayer shall read: "Wherefore plaintiff demands judgment against The Sioux National Bank, defendant herein, for the sum of $173.11, on the third count of the amendment" (Abs., p. 23). And it further erred for the reason that the court had judicial knowledge of the forfeiture of the entire interest and was vested with the power to declare judgment, and the claim made in the prayer should not have been ruled out by motion.

22. The court erred in overruling the second ground of
46 the motion to strike from amended petition and to make more specific (Abstract, pp. 1, 2 and 4), and for the reasons: That this portion of the pleadings was not a part of count three, but instead was a part of the general prayer (Abs., p. 23) to the petition, and should not have been considered as a whole in connection with the entire petition, as applicable to the provisions of sections 5197 and 5198, Revised Statutes.

23. The court erred in sustaining the grounds of said motion asking that said amended petition be made more specific (Abstract

p. 2, pars. 1 and 2, and Abstract, p. 4), for the reasons: That the demands made by defendant were not specific, and in so far that under sections 5197 and 5198, Revised Statutes, once the greater rate was charged into the account or other evidence of debt, the entire petition must be included as one demand until it shall be determined to what extent the taint of forfeiture existed.

24. The court erred in sustaining defendant's motion to elect to divide and make more specific paragraphs first, second, third, fourth, fifth, sixth and seventh, for the reasons: That it was not specific or consistent; that it also erred in sustaining plaintiff's demurrer to first count (Abstract, 31) for want of consistency and not being specific. And to the second count (Abstract, pp. 31, 32) for the reason that the grounds are not clearly stated nor numbered, and are wanting in consistency and not being specific; and to motion to strike from amended petition and to make more specific (Abstract, pp. 1 and 2), for the reason that it is not specific and the rulings thereon are not consistent with the pleadings and the imposed judicial notice on the court.

25. That the court erred in overruling the motion of plaintiff for a rehearing upon the grounds stated by reference to the recent decision of the Supreme Court of the United States in the case of Brown *vs.* Marion National Bank of Lebanon, Ky., 169 U. S., 47 416 (Abstract, pp. 3 and 4); and the trial court further erred in not recognizing that judicial construction of a statute by the superior court must be followed, and that all acts of the inferior court on questions inconsistent with such constructions are void.

26. The court erred in sustaining the motion of defendant for a rule upon plaintiff that he should amend count three (Abstract, pp. 33, 34) after plaintiff had elected "to stand on the record in this cause as now made and not plead over" following the rulings of the court on defendant's motion "to strike from the third count of the amended petition and to make more specific," and upon the motion of plaintiff for a rehearing (Abstract, pp. 3, 4) for the reasons: That under the pleadings and resting of plaintiff, the motion of the defendant was a waiver of all rulings of the court proceedings in defendant's behalf and that the court should have ruled that the plaintiff's continued prayer to be permitted to examine the books, accounts, checks, vouchers and other evidences of the dealings and business had between plaintiff and defendant, and as otherwise pleaded should have been granted and the pleadings entire regardless of counts, paragraphs, or sections or divisions, should have been considered as a whole.

27. That the court erred in rendering judgment in favor of the defendant and against the plaintiff in this action and in dismissing the plaintiff's bill, to which the plaintiff at the time duly excepted (Abstract, p. 34).

D. H. TALBOT.

I hereby certify that the cost of printing this abstract was $39.20.

D. H. TALBOT.

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49 The cause, having been fully argued by counsel of the respective parties, was on the 25th day of January duly submitted to said court on the foregoing record.

And afterwards, on the 22nd day of May, said court filed its written decision (opinion), the same being in the words and figures following, to wit :

In the Supreme Court of Iowa.

Filed May 22, '00.

DANIEL H. TALBOT, Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Appellee.

Appeal from Woodbury district court, Hon. Geo. W. Wakefield, judge.

Action to recover usury under section 5198 of the Revised Statute of the United States. A demurrer to the petition was sustained. Plaintiff appeals.

D. H. Talbot, for appellant.
J. S. Lothrop, for appellee.

50 SHERWIN, *J.:*

In his petition the plaintiff avers that he commenced doing business with the defendant bank about May 27th, 1889, and that on the 24th of February, 1890, he gave the defendant one ten-thousand-dollar note, in which was included usurious interest which the bank had charged the plaintiff; that on the 4th day of March, 1890, the plaintiff executed and delivered to the defendant his note for twenty-eight thousand dollars; that said note was given to cover borrowed money, the ten-thousand-dollar note of February 24, 1890, and illegal interest and charges which the bank had before made against the plaintiff.

The defendant demurred to the two counts of the petition alleging the cause of action herein stated. Several grounds were stated in the demurrer, among others, that the statute of limitations had run against the plaintiff's claim. The demurrer was sustained generally, and, the plaintiff electing to stand on his pleadings, the cause as to the claim made in counts one and two of the petition was dismissed.

The twenty-eight-thousand-dollar note was never paid by the plaintiff. A land mortgage was given to secure it, and that was foreclosed in Plymouth county, Iowa, and a decree rendered against the plaintiff thereon May 6th, 1891. The land covered by this mortgage was sold some time thereafter, just when does not certainly appear, but it was more than two years prior to the commencement of this action.

Section 5198 of the Revised Statutes of the United States provides for the recovery back of twice the amount of unlawful interest paid if the action therefor be commenced within two years from the time the usurious transaction occurred.

This action was begun Oct. 7, 1896, and at that time the plaintiff's cause of action was barred and the demurrer for that reason was properly sustained. There was no error in striking a part of the prayer from the third count of the petition.

The judgment is affirmed.

Ladd, J., took no part.

51 And on the same day a final judgment was rendered against said appellant, the record thereof being in the words and figures following, to wit:

"DANIEL H. TALBOT, Appellant, vs. SIOUX NATIONAL BANK OF SIOUX City, Iowa.	Appeal from Woodbury District Court.

In this cause, the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $18.00, and that execution issue therefor."

52 And afterwards, on the 25th day of October, there was filed in the office of the clerk of said court a petition for writ of error, writ of error, bond, citation, and assignment of errors, true and correct copies of which have been retained in said clerk's office and the originals are hereto attached and made a part of the return to said writ of error.

53 Filed Oct. 25, 1900. C. T. Jones, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant, v. SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.	Petition for Writ of Error.

And now comes Daniel H. Talbot in proper person, the above-named plaintiff and appellant, and respectfully shows the court that on or about the 22nd day of May, 1900, this court entered judgment herein in favor of the said defendant and appellee, The Sioux National Bank of Sioux City, Iowa, and against the appellant therein, this petitioner, in which judgment and the proceedings had prior thereunto in the said cause certain errors were committed to the prejudice of this petitioner, all of which will more fully and in detail appear from the assignment of errors filed herewith and made a part hereof.

This petitioner further shows that in the rendition of said judgment and in the proceedings had prior thereunto in this cause there was drawn in question and involved and specially set up and claimed by petitioner a title, right, privilege, or immunity under a
54 statute of the United States, to wit, under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right,

privilege, or immunity so specially set up and claimed by your petitioner.

Wherefore your petitioner prays that writ of error may be issued in this behalf from the Supreme Court of the United States to this honorable court for a correction of the errors complained of, and that a transcript of the record and proceedings and papers in this cause may be duly authenticated and transmitted to the Supreme Court of the United States.

DANIEL H. TALBOT,
In Proper Person.

J. M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Of Counsel for Petitioner.

Allowed by—
C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

55 *Assignments of Error.*

I.

The court erred in holding and deciding upon the demurrer filed herein that the plaintiff had not stated a good and sufficient cause of action.

II.

The court erred in sustaining the demurrer of the defendant in said cause in this:

(*a.*) In holding that the first count of said petition, which purports to be for the recovery under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, does not state a cause coming within the provisions of such statutes, whereas said account alleges full and sufficient cause of action under said sections.

(*b.*) In holding that the cause of action stated in the second count of the petition is barred by the limitation of section 5198 of the Revised Statutes of the United States, whereas it appears in said petition that the charges of illegal interest made against plaintiff in error by the defendant bank were made from time to time without
56 his knowledge or consent; that such transactions were fraudulently concealed from the plaintiff in error, and that knowledge of the same was not obtained by him until within two years prior to the commencement of the suit by the plaintiff in error.

(*c.*) That the second count of the petition purports to be for the recovery of unlawful interest, and that it appeared from said count that the plaintiff had paid the defendant no interest, whereas said count properly alleges and avers the payment of such unlawful interest.

III.

The court erred in sustaining the demurrer and in dismissing plaintiff's petition because upon the face of the petition it appeared

that the cause of action alleged was one arising under section No. 5198 of the Revised Statutes of the United States, and under such statute involved a right, claim, privilege, or immunity secured to him by the provisions of the said statute, and that the same is particularly and specially pleaded in said petition.

57 IV.

The court erred in affirming the judgment of the trial court sustaining the demurrer of defendant to the plaintiff's petition and in dismissing said petition, whereas in law said court should have reversed the judgment of the trial court.

DANIEL H. TALBOT,
In Proper Person.

J. M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, Jr.,
Of Counsel for Plaintiff in Error.

57½ [Endorsed:] Sioux nat. bk.

58 Filed Oct. 25, 1900. C. T. Jones, Clerk Supreme Court.

Writ of Error to a State Supreme Court.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Daniel H. Talbot, plaintiff, and Sioux National Bank of Sioux City, Iowa, defendant, upon the twenty-second (22d) day of May, at the May term, 1900, thereof, wherein that in the rendition of said judgment and in the proceedings had prior thereunto in this cause there was drawn in question and involved and specially set up and claimed by petitioner a title, right, privilege, or immunity under a statute of the United States, to wit, under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right, privilege, or immunity so specially set up and claimed by plaintiff, a manifest error hath happened, to the great damage of the said Daniel H. Talbot, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid and all things concerning the same, together with this writ, at Wash-

ington, District of Columbia, and filed in the office of the clerk of the United States Supreme Court on or before the twenty-fourth day of November next, in the said Supreme Court to be then and
59 there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of October, in the year of our Lord one thousand nine hundred.

[Seal U. S. Circuit Court, Southern District Iowa.]

[L. S.] EDWARD R. MASON,
Clerk of the United States Circuit Court
for the Southern District of Iowa.

Allowed by—
C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] Writ of error.

60 Filed Oct. 25, 1900. C. T. Jones, Clerk Supreme Court.

American Surety Company of New York. Cash capital, $2,500,000. The largest and strongest surety company in the world. Court and contract bonds executed at Sioux City office.

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.

Know all men by these presents that Daniel H. Talbot, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the Sioux National Bank of Sioux City, Iowa, in the sum of two hundred and fifty dollars, to be paid to the said Sioux national bank or its receiver, successors, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs, executors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals and dated this 24th day of October, A. D. 1900.

Whereas the above-named Daniel H. Talbot has caused a writ of error to be sued out from the Supreme Court of the United States to the supreme court of Iowa to reverse the judgment in the above-entitled cause rendered by the said supreme court of the State of Iowa affirming the judgment of the district court of Woodbury county, Iowa, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Daniel H. Talbot shall prosecute said writ of error to

effect and answer all costs if he shall fail to make good the said writ of error, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal American Surety Company, New York.]

DANIEL H. TALBOT, *Principal.*
AMERICAN SURETY COMPANY OF NEW YORK,
By E. W. RICE, *Resident Vice-President.*
JAMES DOUGHTY,
Resident Ass't Secretary.

{ Two 2-cent U. S. internal-revenue stamps, canceled 10, 24, 1900. Am. Surety Co. }

Approved by me this 25th day of October, 1900.

C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

61 *Citation.*

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant,
vs.
SIOUX NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.

The United States of America to the Sioux National Bank of Sioux City, Iowa, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the 24 day of November, 1900, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Daniel H. Talbot — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. T. Granger, Chief Justice of the supreme court of Iowa, this 25th day of October, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of Iowa.]

C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] Citation.

62 STATE OF IOWA, } ss:
Woodbury County, }

I, Daniel H. Talbot, on oath depose and say that I was present when Mr. E. W. Pecaut, as deputy sheriff of Woodbury county, State of Iowa, served upon Jonathan W. Brown, receiver of the

Sioux national bank, and J. S. Lothrop, attorney of record for said bank in this case, the hereto-attached citation from the supreme court of the State of Iowa, bearing date of October 25, 1900, giving notice of the granting of a writ of error in the case of Daniel H. Talbot *v.* Sioux National Bank of Sioux City, Iowa, by said court to the Supreme Court of the United States, at Washington, D. C., and demanding appearance thereto upon the 24th day of November, 1900.

That I further swear that the said J. S. Lothrop offered, as its attorney of record, to accept service, suggesting, however, afterwards that it would be just as well for the deputy to complete his return, though his acceptance would have been made without such service.

And, further, for the purpose of supplementing my telegraphic notice to the honorable Comptroller of the Currency which I sent to him from Des Moines, Iowa, by the Western Union Telegraph Company under date of October 25, 1900, as follows: "Writ of error granted by chief justice supreme court of Iowa today, case of myself against Sioux National Bank of Sioux City, Iowa, and
63 with bond also filed with clerk of supreme court, Iowa; citation also issued by same chief justice," the following telegram, addressed to the honorable Comptroller of Currency, Washington, D. C., was sent by the Western Union Telegraph Company a few minutes after the serving of the hereto-attached citation upon the said receiver, Jonathan W. Brown, and attorney of record, J. S. Lothrop:

"Service of citation, case of Daniel H. Talbot against Sioux National Bank of Sioux City, Iowa, made upon Jonathan W. Brown, receiver for said bank, and also upon J. S. Lothrop, attorney of record.

(Signed) E. W. PECAUT,
Deputy Sheriff.
DANIEL H. TALBOT."

To all of the foregoing I do solemnly make oath, and, further, that I am the plaintiff in the case against the Sioux national bank herein named.

DANIEL H. TALBOT.

Subscribed and sworn to in Sioux City, Iowa, before me, a notary public in and for Woodbury county, in my presence, this 26th day of October, 1900, by the said Daniel H. Talbot.

[Notarial Seal, T. F. Bevington, Iowa.]

T. F. BEVINGTON,
Notary Public in and for Woodbury County, Iowa.

64 STATE OF IOWA, } ss:
Woodbury County, }

I, E. W. Pecaut, deputy sheriff in and for Woodbury county, Iowa, on oath depose and say that the within notice came into my hands for service on the 26th day of October, 1900, at 9.20 a. m., and that

I served the same on J. W. Brown, receiver of the Sioux national bank, on the said 26th day of October, 1900, at 9.45 a. m., and on the same day at 9.50 a. m. I served said notice on J. S. Lothrop; that said notice was served on each of said parties, J. W. Brown, receiver of the Sioux national bank, and J. S. Lothrop, by offering to read the said notice to each of them personally, which reading they each then and there waived, and by delivering to each of them personally a true copy thereof. All done in Sioux City, Woodbury county, Iowa, on the day and date above stated.

E. W. PECAUT.

Subscribed and sworn to before me and in my presence this 26th day of October, 1900, by the said E. W. Pecaut.

[Notarial Seal, E. G. Dilley, Iowa.]

E. G. DILLEY,
Notary Public in and for Woodbury County, Iowa.

65 STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings, with all things concerning the same, in the case of Daniel H. Talbot, appellant, against The Sioux National Bank of Sioux City, Iowa, recently tried and determined in the supreme court of Iowa.

And I further certify that the petition for writ of error, assignment of errors, writ of error, bond, and citation are attached to the foregoing transcript in original form as a part of the return to said writ of error, true and correct copies thereof having been retained and lodged in my office, and this return is made in obedience to said writ.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and official seal, at Des Moines, Iowa, this 27th day of October, 1900.

C. T. JONES,
Clerk Supreme Court of Iowa.

Endorsed on cover: File No., 17,963. Iowa supreme court. Term No., 478. Daniel H. Talbot, plaintiff in error, *vs.* The Sioux National Bank of Sioux City, Iowa. Filed November 7, 1900.